IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 112 of 2002
with
Appeal from Order Nos. 113, 114, 115, 116,
117, 190, 191, 282, 283 and 365 of 2002
with
Civil Application No.6193 of 2002
in
Appeal from Order No.365 of 2002
with
Civil Application No.7117 of 2002
in
Appeal from Order No.282 of 2002
with
Civil Application No.7118 of 2002
in
Appeal from Order No.283 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHREERANG DEVELOPERS

Versus

HIMMATLAL JAMNADAS MANIAR

Appearance:
A.O. Nos. 112, 113 and 114 of 2002.
Mr.S.B. Vakil, with MR AS VAKIL,
for appellant Nos. 1-13
Mr.A.J. Patel, for respondents 1 to 4
Mr.P.M.Thakkar, with Mr.N.V.Solanki, for
respondent 5.

A.O.Nos. 115, 116 and 117 of 2002.
Mr.A.J. Patel, Advocate, for the appellants.
Mr.P.M.Thakkar, with Mr.N.V.Solanki, for
respondent 1.
Mr.S.B. Vakil for respondents 2 to 13.

A.O.Nos. 190, 191, 282, 283 and 365 of 2002.
Mr.P.M.Thakkar, with Mr.N.V.Solanki, for the
appellants.
A.O.No.190 of 2002
Mr.A.J. Shastri for respondent No.1
Mr.S.B.Vakil for respondents 2.2 to 2.12.
A.O. 191 of 2002
Mr.A.J. Shastri for respondent No.1
Mr.S.B.Vakil for respondents 2.2 to 2.12.
A.O.282 of 2002
Mr.A.J. Shastri for respondent No.1 to 4
Mr.S.B.Vakil for respondents 5 to 17
A.O.283 OF 2002
Mr.A.J. Shastri for respondent No.1 to 4
Mr.S.B.Vakil for respondents 5 to 17
A.O.365 of 2002
Mr.A.J. Shastri for respondent No.1 to 4
Mr.S.B. Vakil for respondents 5 to 17

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 10/04/2003

Common C.A.V. JUDGEMENT

1. Since common points are involved in all these Appeals, with the consent of parties, all these Appeals are taken up for hearing together. So far as A.O. Nos. 190, 191, 282, 283 and 365 of 2002 are concerned, they are at the admisison stage and it is agreed that the said Appeals are also to be heard finally, along with the other Appeals, which are already admitted by this Court. Accordingly, the said Appeals are also ordered to be admitted and heard finally with the rest of the appeals.

2. There is a property, bearing Ward No.2, Nondh No.3, situated at Ring Road, Rustampura, Surat City. There was a big parcel of land, which originally belonged to one Sarguru Niyazali Shah and his four sons. There were many hutment dwellers occupying portion of the said property. The said hutment dwellers were the tenants of the original owner, Sarguru Niyazali Shah. The said original owner, Sarguru Niyazali Shah, by various sale deeds, sold away the said property, viz., 43 plots, to 22 persons, including the present plaintiffs. The said property was sold to the plaintiffs and other purchasers in October, 1983 by way of registered sale deed and accordingly, the plaintiffs became owners of the respective areas of the land in question. It is not in dispute that the said property was sold with the existing huts and 108 hutment dwellers were residing at the relevant time in the said land. Out of the said total 22 purchasers, who have purchased 43 plots, in all, in between them, 8 persons instituted Civil Suits before the Civil Judge (Senior Division), Surat, for a declaration and injunction and submitted applications Exhibit 5 for interim injunction.

So far as Regular Civil Suit No.703 of 1997 is concerned, the same was filed on 27.11.1997 and its new number is Special Civil Suit No.456 of 2001. The said suit is filed by one Haribhai Balubhai Parekh as Power-of-attorney holder of Kantaben Ramchandra Parte. The case of the plaintiff in the said suit is that the plaintiff is the owner of the suit property, being the property admeasuring 127.10 sq.metres, situated at : City Survey No.2, bearing Ward No.2, Nondh No.3/11, situated at Ring Road, Rustampura, Surat City, that she purchased the said property from its original owner, Sarguru Niyazali Shah and his four sons, that she has become owner by virtue of the sale deed executed by the said original owners in her favour on 24.10.1983, that the plaintiff wanted to sell the said property and the intending purchaser, therefore, gave public notice through his Advocate Mr.Pravin P. Devmurari. The said notice was given on 22.10.1997, inviting objections. In response to the said notice, reply was given by the defendants in the newspaper on 30.10.1997 and, according to the plaintiff, on the basis of the said reply to the public notice, the plaintiff enquired from the office of the Sub Registrar, and on enquiry, it came to the notice of the plaintiff that a document of sale is executed by one Maneklal Bhagwandas Reshamwala as power-of-attorney holder of the plaintiff Kantaben Ramchandra Parte in favour of one Himmatlal Jamnadas Maniar and the sale consideration is mentioned as Rs.49,000/- in the said

document. The case of the plaintiff is that the plaintiff had never given any such power-of-attorney to Maneklal Bhagwandas Reshamwala and the plaintiff had never signed any such power-of-attorney in favour of the said person. The case of the plaintiff, therefore, is that the said Maneklal Bhagwandas Reshamwala, in collusion with defendant Nos. 1 to 3, has prepared false documents and that, by virtue of the said document, the said Himmatlal Jamnadas Maniar cannot be said to have been the owner.

3. During the pendency of the suit, the plaintiff submitted an application for interim injunction at Exhibit 5. The plaintiff also submitted another application at Exhibit 51, as, during the pendency of the said suit, a caveat was submitted by one Shrirang Developers, a partnership firm, to the effect that they have purchased the suit property and, therefore, no interim order may be given without hearing them. In view of the receipt of the said caveat, the plaintiff of the said suit submitted an application for joining the said purchasers, who were subsequently joined as defendants 5 to 17 in the aforesaid suit, being Regular Civil Suit No.703 of 1997, which is now converted into Special Civil Suit No.456 of 2001.

4. So far as Regular Civil Suit No.704 of 1997 is concerned, the said suit is also filed on the same day, i.e., on 27.11.1997. The said suit was, subsequently, converted into Special Civil Suit No.457 of 2001. The said suit is filed by one Rupaliben Jayantkumar Patel. There also similar types of averments are made regarding giving of public notice by the intending purchaser of her property through the Advocate and regarding reply to the said public notice, etc. The said plaintiff also accordingly filed the said suit for a declaration and injunction and the say of the said plaintiff is also the same that she had never given any power-of-attorney to any one for transfer or sale of the property to any one.

5. So far as Regular Civil Suit No.705 of 1997 is concerned, the same was subsequently converted into Special Civil Suit No.458 of 2001, and the said suit is filed by one Hemantkumar Mohanlal Jani and the averments in the said suit are also on the same lines regarding giving of public notice by the intending purchaser of his property through the Advocate and regarding reply to the said public notice, that he had not given any such power-of-attorney to any one for selling the property and that the so-called sale deed is a forged and bogus document, and that the said Himmatlal Jamnadas Maniyar

had never become owner of the said property by virtue of the said fraudulent sale deed, etc.

6. So far as Regular Civil Suit No.721 of 1997 is concerned, the said suit is filed by one Amul Shashikant Parekh. The said suit is now converted into Special Civil Suit No.307 of 2001. The said suit was filed on 9.12.1997.

7. So far as Regular Civil Suit No.722 of 1997 concerned, the same is now converted into Special Civil Suit No.308 of 2001. The said suit is filed by one Ashish Harilal Parekh. The said suit is filed on 9.12.1997.

8. So far as Regular Civil Suit No.723 of 1997 is concerned, the same is filed by one Maheshkumar Shantilal Agarbattiwala. The said suit is now converted into Special Civil Suit No.306 of 2001. The said suit is also filed on 9.12.1997.

9. So far as Regular Civil Suit No.171 of 1999 is concerned, the said suit is filed by Mayurkumar Haribhai Parekh. The said suit is now converted into Special Civil Suit No.408 of 2001 and the said suit is filed by one Mayurkumar Haribhai Parekh.

10. So far as Regular Civil Suit No.172 of 1999 is concerned, the said suit is filed by one Mayurkumar Haribhai Parekh. The said suit is now converted into Special Civil Suit No.409 of 2001.

11. In all these suits, the stand of the plaintiffs is same to the effect that they have not given any power-of-attorney and after purchasing the suit property, they have not transferred or sold it to any one. The case of the plaintiffs in each of the suits is that having come to know about the stand taken by the defendants in response to the public notice issued by the Advocate of the intending purchasers, on whose behalf public advertisement was given, the plaintiffs started making enquiry and, ultimately, they came to know that on the basis of some fabricated and false power-of-attorneys, sale deeds have been executed, by which their property is conveyed on the basis of the aforeaid forged documents. Accordingly, in all these suits, the plaintiffs submitted an application for interim injunction, restraining the defendants from transferring or alienating the suit property. As stated earlier, since the original defendants transferred the

suit property during the pendency of the suit, the purchasers have also been joined subsequently in the suit and injunction is also prayed against the purchasers.

12. The original defendants of the aforeaid suits appeared in the suits and resisted the suits as well as the applications for interim injunction. The allegations of the plaintiffs are denied by the defendants in toto.

13. The defendants resisted the said suits on various grounds. It is the say of the defendants that the property was divided into various plots. On 20.2.1987, the plaintiff executed the power-of-attorney in favour of defendant, Maneklal Bhagwaandas Reshamwala and that the consideration of Rs.49,000/- was also paid to the plaintiff. It is the say of the defendants that on 9.12.1994, a registered sale deed of the said plot was executed in favour of Himmatlal Jamnadas Maniar, i.e. defendant No.1, by the power-of-attorney holder of the plaintiff. It is also the say of the defendants that the plaintiff has got no right, title or interest over the suit property from the date of execution of the sale deed, but because of the dispute between Haribhai Balubhai Parekh and Maneklal Bhagwandas Reshamwala, at the instance of the said Haribhai Parekh, the present suit is filed by the plaintiff, which is not tenable in law. It is also the say of the defendant that the suit property is already sold to Himmatlal Jamnadas Maniar by way of registered sale deed and, therefore, the plaintiffs have absolutely no right, title or interest over the same. According to the defendants, since the plaintiffs want to knock out more money, the said suits are filed. It is also the say of the defendants that the suits are also hopelessly time-barred as the said suits were required to be filed within a period of three years from the aforesaid sale deed executed in favour of said Himmatlal Jamnadas Maniar. Since in all these suits, the say of the defendants is more or less common, it is not necessary to state the facts of the written statements of each of the said suits, as, ultimately, in substance, the case of the defendants is that the plaintiffs have no right, title or interest and that the document executed in favour of Himmatlal Maniar is absolutely legal and valid and that the suits of the plaintiffs are nothing but an aforethought and, therefore, it is prayed that on the same lines, interim applications at Exhibit 5 are also required to be rejected.

14. Out of the aforesaid total eight suits, some were placed for hearing of the injunction application before one Civil Judge and some suits were placed before another

Civil Judge. So far as Special Civil Suit Nos. 456, 457 and 458 of 2001 are concerned, the learned Civil Judge (Senior Division), Surat, by the impugned order, allowed the application Exhibit 5 as well as the applications Exhibits 51, 55, and 58, by which injunction granted earlier at an ad interim stage was made absolute till the disposal of the suit.

15. Initially, in the said suits, the trial court, by ad interim order dated 27.11.1997, restrained the defendants from transferring the suit property in any manner to any one and, ultimately, by the final order, the learned trial Judge allowed the application Exhibit 5 and the trial court has observed in the order that the ad interim injunction granted below Exhibit 5 and extended from time to time is made absolute till the final disposal of the suits. The trial court also allowed other interim Applications, by which the purchaser was also restrained from putting up any construction over the disputed property.

16. So far as Appeal from Order No.112 of 2002 is concerned, the same is filed by the original defendants 5 to 17 of Special Civil Suit No.458 of 2001.

So far as Appeal from Order No.113 of 2002 is concerned, the same is filed by the subsequent purchasers, i.e. original defendants 5 to 17 of Special Civil Suit No.457 of 2001.

So far as Appeal from Order No.114 of 2001 is concerned, the same is also filed by the subsequent purchasers, viz., defendants 5 to 17, challenging the order of the trial court passed below Exhibits 5 and 51 in Special Civil Suit No.456 of 2001.

So far as Appeal from Order No.115 of 2002 is concerned, the said A.O. is filed by the original defendants 1 to 4 of Special Civil Suit No.457 of 2001, challenging the order by which the order below Exhibit 5 is confirmed by the trial court by the impugned order.

So far as Appeal from Order No.116 of 2002 is concerned, the same is also filed by the original defendants 1 to 4 of Special Civil Suit No.458 of 2001, challenging the order by which the interim injunction below Exhibits 5 and 55 is made absolute by the trial court.

So far as Appeal from Order No.117 of 2002 is

concerned, the same is also filed by defendants 1 to 4, challenging the order passed below Exhibits 5 and 51 in Special Civil Suit No.456 of 2001.

Accordingly, the aforesaid six Appeals, viz., AO Nos. 112, 113, 114, 115, 116 and 117 of 2002, are preferred by original defendants 1 to 4 as well as by the original defendants 5 to 17 of Special Civil Suit Nos. 456, 457 and 458 of 2001, aggrieved by the order passed below Exhibits 5, 51 and 55. Accordingly, both the original defendants as well as the subsequently joined defendants, who are the subsequent purchasers, have challenged the order of the trial court by way of filing these six Appeals.

So far as A.Os. 190, 191, 282, 283 and 365 of 2002 are concerned, the said appeals are preferred by the original plaintiffs. So far as the interim applications in the aforesaid suits are concerned, the applications preferred by the plaintiffs in the suits, viz., Special Civil Suits Nos. 306, 307, 308, 408 and 409 of 2001, were heard by another Civil Judge and by the impugned order, the learned trial Judge rejected the application for interim injunction on various grounds.

Being aggrieved by the impugned order of the trial court, by which Exhibit 5 application is rejected and injunction is refused in their favour, the aforesaid plaintiffs of the said Special Civil Suits have preferred these five A.Os. Accordingly, out of the total eight suits, referred hereinabove, in three suits, injunction was granted by the trial court against the original defendants as well as against the purchasers and in five suits, the trial Judge has rejected application Exhibit 5, against which the aforesaid A.Os. are filed by the original plaintiffs. So far as these five appeals of the original plaintiffs are concerned, the same were pending at an admisison stage and it was placed for admisison at a later point of time. However, Advocates of both the sides agreed that since common points of facts and law are involved in all these appeals, all the Appeals can be heard and decided together, and, accordingly, as stated earlier, this set of Appeals are also heard finally, with the consent of the parties.

17. So far as A.Os. 190, 191, 282, 283 and 365 of 2002 are concerned, Mr.P.M.Thakkar, learned Advocate, is appearing for Mr.N.V. Solanki, and he submitted that since there is a triable issue involved in the matters and when there is a prima facie case in favour of these plaintiffs, and especially when in similar type of

matters, the other trial Judge has already granted injunction, the plaintiffs are also required to be protected by way of interim injunction during the pendency of the suit. Mr.Thakkar further submitted that if the property is allowed to be sold during the pendency of the suit, the plaintiffs will suffer immensely. Mr.Thakkar further submitted that the plaintiffs have never executed any document in the nature of power-of-attorney and, therefore, the plaintiffs are totally ignorant and, they were surprised when they read the reply to the public notice given by the Advocate of the intending purchaser and in response to the same, the defendants disclosed the fact about the so-called sale deed. He submitted that all the so-called documents, viz., the power-of-attorney, purported to have been given by the plaintiffs are all forged documents and that the sale deed is also bogus and fraudulent and that the same is also not binding on the plaintiffs.

Mr.Thakkar further submitted that even though there was an injunction granted at least in some of the suits, yet, the defendants, in violation of the injunction, transferred the property and, therefore, the aforesaid purchasers are required to be restrained now from making further construction and transferring and alienating the property to any one during the pendency of the suit. Mr.Thakkar submitted that since the plaintiffs were not aware about the transactions and since all these transactions are fraudulent, the question of limitation would not arise, as, from the date of knowledge, they filed the suits within the period of limitation. Mr.Thakkar also submitted that the defendants may be directed to give security during the pendency of the suit as regards the respective shares of the plaintiffs so that if the suits are decreed, the plaintiffs can recover the monetary claim for their respective properties.

It is also submitted that even when the suit was filed, huts were already in existence and hutment dwellers were occupying the property. He also submitted that the suit property was never transferred in favour of the defendants.

In A.O. Nos.365, 282 and 283 of 2002, Civil Applications for additional evidence, being Civil Application Nos. 6193, 7117 and 7118 of 2002, have been fled, by which the plaintiffs wanted to place on record certain documentary evidence, which was not produced before the trial court.

Mr.Thakkar also further submitted that after

reading the reply of the defendants by way of reply to the public notice, the plaintiffs tried to enquire about the matter and, therefore, after getting appropriate material and collecting the data, the suits are filed and, therefore, there is no delay in filing the suit.

Mr.Thakkar submitted that since the plaintiffs have never executed any power-of-attorney in favour of defendant No.4 and that since the defendants have created false documents and executed sale deeds in favour of defendant No.1, the injunction prayed for is required to be granted during the pendency of the suit.

Mr.Thakkar has also further argued that the manner in which the stamp papers of the same serial number etc., are purchased, creates doubt about the genuineness. He has also emphasized upon certain erasures and overlappings in the documents.

Mr.Thakkar has also offered the comments about the affidavit filed by Advocate Mr.Dilipbhai Kapadia, who has filed the same in the suit and in his affidavit, he has given the description as to how he prepared the power-of-attorneys. He also submitted that it is not possible to believe that the defendants may not even ask for any receipt after making the payment of consideration to the plaintiffs. He also submitted that it is not possible to believe that the entire consideration amount is paid in cash. He, therefore, submitted that the appeals filed by the original plaintiffs should be allowed and the appeals filed by the defendants should be dismissed.

Mr.Thakkar submitted that since the purchasers had full knowledge about the fact that suits are pending and despite that, they decided to purchase the property, they should not be permitted to develop the property any further, because, they have purchased the property with open eyes and that in some of the suits, even though injunction was in force, the purchasers in a high handed and arbitrary manner, continued with the construction. He further submitted that no further construction should be permitted in any manner.

Mr.Thakkar also submitted that it cannot be said that there is no prima facie case in favour of the plaintiffs and, ultimately, the plaintiffs will be able to prove their case after adducing appropriate evidence before the trial court and, therefore, the defendants are required to be restrained from making further construction.

Mr.Thakkar also relied upon certain affidavits, which are submitted on behalf of the plaintiffs in support of their Application Exhibit 5.

By submitting Civil Application No.6193 of 2002 in A.O. No.365 of 2002, documentary evidence in the nature of report of handwriting expert, one Mr.K.R.S. Pillai, as well as affidavit of one Mr.Somabhai Patel, Deputy Mamlatdar and Executive Magistrate, Surat, is sought to be produced on record. So far as the affidavit of the said Magistrate is concerned, he has stated in the affidavit that he has never attested the powers-of-attorney nor is there any stamp paper of his office and that somebody seems to have forged the rubber stamp of his office. On behalf of the original plaintiff of A.O. No.365 of 2002, it is prayed that the Civil Application for additional evidence may be allowed and the said documents may be taken on record.

Mr.Thakkar also submitted that defendants have not produced any documentary evidence to show that they have legal right or title over the property.

18. Mr.S.B. Vakil, learned Advocate, who is appearing in A.O. Nos. 112, 113, and 114 of 2002, submitted that there is absolutely no prima facie case in favour of the plaintiffs and, therefore, no injunction can be granted in favour of the plaintiffs. Mr.Vakil submitted that the suits filed by the plaintiffs are all hopelessly time-barred and that, in order to bring the suits within the period of limitation, so-called public advertisement is issued by the intending purchasers. He submitted that there is nothing like "intending purchasers" and nowhere names of such intending purchasers are disclosed at any point of time. Mr.Vakil also further submitted that in order to bring the suit within the period of limitation, the plaintiffs have given the advertisement in the name of the intending purchasers. Mr.Vakil also submitted that the plaintiffs are interested in knocking out more money and out of 22 original owners who have sold away their property to the defendants, through their power-of-attorney, it is only the present plaintiffs, who have raised this dispute and that the case of the plaintiffs is not at all bona fide. Mr.Vakil also further submitted that similar transactions are also entered into with all the 22 persons, but the plaintiffs, who are fighting this litigation with the help of Haribhai Balubhai Parekh, have filed the suits with ulterior motive. Mr.Vakil also tried to demonstrate

the genuineness of the documents and registration etc. by giving particulars as to how there are different dates in the purchase of stamps, etc.

Mr.Vakil also submitted that assuming that the plaintiffs are the owners of the land, then also, the defendants 5 to 17 have already put up construction and they are the owners of the constructed portion and by virtue of the doctrine of dual ownership, the defendants have become owners of the constructed portion and, therefore, they cannot be restrained, by way of injunction, from using their own constructed portion. Mr.Vakil also submitted that there is a registered document of sale in favour of the defendants and, therefore, the plaintiffs are supposed to have constructive notice of the said fact and, therefore, all the suits of the plaintiffs are time barred.

Mr.Vakil has also referred to the affidavits which are on the record. Mr.Vakil has also relied upon the fact that the defendants purchased the property from the original owner by making cash payment and, there is nothing against the present defendants to show that they have not purchased the property by paying the consideration in cash. Mr.Vakil has also further relied upon the affidavit filed by Mr.Kapadia, Advocate, as well as the affidavit of the original owner, Sarguru Niyazali Shah.

Mr.Vakil has also relied on certain judgments on the principle of dual ownership as well as on the question of limitation. He submitted that under Article 59 of the limitation Act, the suit was required to be filed within a period of three years from the date of execution of the document of sale.

So far as the additional evidence is concerned, it is submitted that the said Applications cannot be entertained in these A.Os. Mr.Vakil further submitted that the plaintiffs remained silent all throughout and during the pendency of the suit, no attempt was made in any manner to produce such documents. He submitted that after the order of the trial court, the plaintiffs have tried to create evidence in their favour. He, therefore, submitted that this additional evidence cannot be taken on record. It is also argued by him that for all these years, the plaintiffs had ample time to produce the evidence before the trial court, but the plaintiff did nothing to produce the same and, ultimately, at a belated stage, as an afterthought, the plaintiffs have tried to produce this evidence, which cannot be taken on record.

Mr.Vakil has also taken the court through the various documentary evidence on record and has also tried to highlight the fact that it is only one section of the original owners, who had tried to bring this litigation at the instance of one Haribhai Balubhai Parekh, and all the plaintiffs are closely related to the said Haribhai Balubhai Parekh. One of the plaintiffs is his son, and all other plaintiffs are relatives. He submitted that Ashish Haribhai Parekh is the son of Haribhai and all other plaintiffs are closely related to the said Haribhai.

Mr.Vakil submitted that, out of the total 22 purchasers of 43 plots, 10 have given power-of-attorney to Maneklal Bhagwandas Reshamwala, 8 to Haribhai Balubhai Parekh and 4 to Mansukhlal A. Jariwala. He submitted that out of 10 persons, who have given the power-of-attorney to Maneklal Bhagwandas Reshamwala, two are the relatives of Haribhai Balubhai Parekh and they have filed the suit. He submitted that since the property was occupied by hutment dwellers, the defendants purchased the same with 108 existing huts over the property. Subsequently, the defendants tried to remove the said hutment dwellers and the plaintiffs have realised that the price of the land has now gone up and, ultimately, approached the court and, therefore, the intention of the plaintiffs is not bona fide. Mr.Vakil also submitted that entire property belonged to one Sarguru Niyazali Shah and 22 persons purchased the same from him and all the 22 people executed power-of-attorney and the power-of-attorneys were executed in favour of Haribhai Balubhai Parekh, Maneklal Bhagwandas Reshamwala and Mansukhlal J. Jariwala. Subsequently, agreement to sell was executed in favour of Ratilal Desai and, subsequently, the said Ratilal Desai transferred his rights in favour of the defendant No.1.

19. After demonstrating the aforesaid facts, in detail, Mr.Vakil submitted that it is only at the instance of Haribhai Balubhai Parekh that his relatives or associates have, ultimately, approached the Civil Court by the said suits. Mr.Vakil also argued that, at the time of deciding interim application, the Court has also to consider the comparative strength of the parties and to consider the material on record, and on the basis of the comparative strength, the plaintiffs have no case worth the name and, therefore, injunction granted by the trial court is required to be vacated. Mr.Vakil has also relied upon certain affidavits which are filed in the trial court. He has relied upon the affidavit of the original owner Sarguru Niazali Shah as well as the

affidavits filed by one Mr.Vinodchandra S. Kapadia, Mr.Pankajbhai Thakorebhai, Mansukhlal A. Jariwala and Thakorebhai Desai. On the basis of the aforesaid affidavits, it is argued by Mr.Vakil that Haribhai Balubhai Parekh and Maneklal Bhagwandas Reshamwala were having good relations and they were friends. However, their relations have become strained since last one-and-a-half years and that since the financial condition of said Maneklal Bhagwandas Reshamwala (defendant No.3 in the suit) is sound, the said Haribhai Balubhai Parekh is trying to fleece money from him. Relying upon the said affidavits, it is submitted by Mr.Vakil that, originally, the disputed property, i.e. property at Ward No.2, Nond No.3, was divided into 43 plots, and different sale deeds were executed qua all the said 43 plots and all the purchasers of the respective properties gave different power-of-attorney to defendant No.3, Maneklal Bhagwandas Reshamwala as well as to Haribhai Balubhai Parekh and Mansukhlal A. Jariwala. Subsequently, aforesaid three persons, viz., Maneklal Bhagwandas Reshamwala, Haribhai Balubhai Parekh and Mansukhlal A. Jariwala, jointly executed agreement to sell in favour of Ratilal Desai on 15.10.1988 and all the aforesaid three persons have signed the said document. Affidavit of Vinodchandra Sakarlal Kapadia is relied upon in this behalf, who has signed as a witness so far as the said document is concerned. Subsequently, according to the defendants, said Ratilal Desai transferred his rights to five persons, viz., Himmatlal Jamnadas Maniar, Ajay Textile Ind. Pvt. Ltd., Ravikiran Polyester Ind. Pvt.. Ltd., Madhavdas Dwarkaas Mehta and Deepakbhai. Mr.Vakil also further submitted that the purchaser - developer is a bona fide purchaser as the said developer has purchased the said property by way of registered sale deed and after paying full consideration. It is, therefore, submitted that the Appeals from Order, which is filed by the subsequent purchasers, should be allowed and the order of injunction should be vacated, in toto.

Mr.Vakil also further contended that except the oral say of the plaintiffs, the plaintiffs have not produced any evidence to substantiate their say in any manner. At the time of hearing of these appeals, Mr.Vakil has tried to explain the date of stamp paper and serial number, etc., by submitting that no such argument was advanced in any manner before the trial court and, therefore, the defendants had no opportunity to deal with the said argument. Mr.Vakil submitted that when stamps are purchased in bulk, then, only one serial number will come. So far as the corrections etc., are concerned, he submitted that, initially, the document was prepared on a

lesser stamp paper and in order to cover up such deficit, new stamp papers were purchased. He submitted that if stamp papers of a particular amount are purchased, then, they will carry the same number. He submitted that had these points been argued before the trial court, the defendants could have explained the same before the trial court also.

He submitted that no such point is even taken in the appeal memo and for the first time, at the time of hearing of the appeals, all these points are taken. Mr.Vakil has also relied upon the affidavits filed before this Court explaining this position. He submitted that since this point was not taken before the trial court, no such explanation or evidence in this connection was tendered before the trial court.

Mr.Vakil also submitted that the documents were executed before the Executive Magistrates and it is only one Executive Magistrate who has filed such affidavit. The Executive Magistrate has not even cared to file such affidavit before the trial court where the suits were pending for four years and, therefore, such affidavit cannot be taken into consideration in the present Appeals.

Regarding carrying out construction in spite of injunction order, it is submitted by Mr.Vakil that since injunction was not extended from time to time, for some time, injunction was not in existence and, therefore, there is no question of breach of the injunction order on the part of the defendants.

20. Mr.A.J. Patel, learned Advocate, who is appearing for the original defendants 1 to 4, has adopted the arguments of Mr.S.B. Vakil.

21. In his rejoinder arguments, Mr.Thakkar has reiterated that in spite of the fact that the suit was pending, the purchaser has purchased the property with open eyes and even though, there was injunction in at least three suits, yet, the purchaser went on making construction. Mr.Thakkar has also taken the Court through all the affidavits submitted by the plaintiffs in the suit. It is also submitted that whether the suit is time barred or not, is required to be considered after full-fledged trial and no such positive finding can be given by the Court that the suit is time barred before such full-fledged hearing of the suits. Mr.Thakkar also argued that so far as the question about giving public notice is concerned, the point that it was only to bring

the suit within the period of limitation, was not specifically taken before the trial court.

Mr.Thakkar argued that this Court may appoint a Commissioner to find out the actual position as on today.

Mr.Vakil resisted the request made by Mr.Thakkar that the trial court be directed to appoint a Commissioner. He submitted that when there is no prima facie case, there is no question of appointing a Court Commissioner. He also submitted that it is not necessary to appoint a Court Commissioner for deciding title. He submitted that, even otherwise, the subsequent purchaser of the property is bound by the decree and, therefore, according to him, any one, who purchases the property during the pendency of the suit, is bound by the ultimate decree to be passed by the Court. He, therefore, submitted that it is not necessary to restrain the defendants 5 to 17 from selling or transferring the suit property.

Mr.Vakil also submitted that when the Corporation has granted building permission and when substantial construction has already come up, the purchasers-defendants cannot be restrained now by injunction from carrying out further construction, especially when substantial construction has already come up.

22. I have heard all the learned Advocates in great detail and I have considered the bunch of documents submitted and I have also gone through the order of both the learned trial Judges.

23. Mr.S.B. Vakil relied upon various authorities to substantiate his case.

Firstly, Mr.Vakil has relied upon the decisions of the Apex Court in Krishnapasuba v. Dattatraya, AIR 1966 SC 1024 and Mrs.Dossilbai v. Khemchand, AIR 1966 SC 1939 in connection with the point of dual ownership. In AIR 1966 SC 1024 (supra), the Apex Court observed as under :-

> " ... ...
>
> (7) Clause 2 of the rent note dated August 28, 1943 covered the entire City Survey No.1577/17, but we are now concerned only with the letting of the portion of the property excluding the shop on the

> northeastern corner. The rent note stated that the subject-matter of the letting for which the rent was payable by the tenant was open land with a "khatta". It is common case before us that "khatta" is not a building. Clause 1 stated that on a portion of the land the tenant had built a shed of corrugated iron sheets at his own cost. Clause 5 stated that on the termination of the tenancy the tenant would remove the structure raised by him including the timber, the pillars, the iron materials and the stores used for paving the floor. On a plain reading of the lease, it is clear that the subject-matter of the lettering was open land and the rent was payable in respect of the open land only and not in respect of the structures raised by defendant No.1. We were referred to decisions in respect of building leases. It si a question of construction of a building lease whether the lease is a demise of the land only, or whether it is a demise of the land together with the building to be constructed by the tenant.
>
> xxx xxx
>
> In this case, we are not concerned with a building lease. The building on the land was constructed by the tenant at his own cost before the execution of the rent note. The building belonged to the tenant and was not the subject-matter of the letting. The land only was the subject matter of the letting. Consequently, the premises are land within the meaning of S.13(1)(i).
>
> ... ..."

Relying upon the said judgment, Mr.Vakil submitted that the purchasers cannot be restrained from dealing with the constructed property as they are the owners of the same.

On the same point, Mr.Thakkar has relied on the decision of the Apex Court in Bai Dosabai v. Mathurdas, AIR 1980 SC 1334, wherein the Honourable Apex Court held as under :-

> " ... ...

6. We do not wish to go in any detail into the question whether the English Equitable doctrine of conversion of realty into personalty is applicable in India. However, we do wish to say that the English doctrine of conversion of realty into personalty cannot be bodily lifted from its native English soil and transplanted in statute-bound Indian law. But, we have to notice that many of the principles of English Equity have taken statutory form in India and have been incorporated in occasional provisions of various Indian statutes such as the Indian Trusts Act, the Specific Relief Act, Transfer of Property Act etc. and where a question of interpretation of such Equity based statutory provisions arises we will be well justified in seeking aid from the Equity source. The concept and creation of duality of ownership, legal and equitable, on the execution of an agreement to convey immovable property, as understood in England is alien to Indian Law which recognises one owner i.e. the legal owner :

xxx xxx

The ultimate paragraph of Section 54 of the Transfer of Property Act, expressly enunciates that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. But the ultimate and penultimate paragraphs of Section 40 of the Transfer of Property Act make it clear that such a contract creates an obligation annexed to the ownership of immovable property, not amounting to an interest in the property, but which obligation may be enforced against a transferee with notice of the contract or a gratuitous transferee of the property. Thus, the Equitable ownership in property recognised by Equity in England is translated into Indian law as an obligation annexed to the ownership of property, not amounting to an interest in the property, but an obligation which may be enforced against a transferee with notice or a gratuitous transferee.

xxx xxx xxx

10. We do not have any doubt, on a consideration of the terms of the deed and the relevant statutory provisions earlier referred, that the obligation of the lessor to sell the land by public auction and pay the excess price to the lessee is an obligation annexed to the ownership of the property, not amounting to an interest in the property, that it is an obligation in the anture of a trust, and, therefore, an obligation which may be specifically enforced.

... ..."

However, at this state, I would not like to decide that issue finally. However, the defendants, even otherwise, assert that they have purchased the land by lawful document.

Regarding prima facie case, Mr.Vakil relied upon the decision in State of Gujarat v. Mangal Traders, 1987(1) GLH 493. It is submitted that the question of limitation is required to be decided first to find out whether there is prima facie case or not. In paragraph 15, this Court has observed as under ;-

" ... ...

15. On the question of prima facie case, of the opponents-plaintiffs, the fundamental question that arises is whether the Civil Court has jurisdiction to entertain such suits and grant any relief. If there is no jurisdiction, the plaintiffs are bound to fail in the suit and then there is no prima facie case for the plaintiffs to succeed in the suit. Mr.Shah submitted that if this issue is finally decided at this stage in the revision application arising out of the interlocutory orer, the whole suit is likely to fail and, therefore, the proper procedure would be to direct the trial court to hear and decide the issue regarding jurisdiction as a preliminary issue and not to decide that question in this revision application. Such plea may sometimes be upheld in the facts and

circumstances of a given case. But there cannot be such general practice to be followed in every case. While granting the injunction, the plaintiffs have to make out a prima facie case on all material issues in the suit in order to show that they are likely to succeed in the suit. On the other hand, the defendant is entitled to show that the plaintiffs are not likely to succeed in the suit and, therefore, the interim injunction shall be refused. Therefore, while deciding the injunction application and the revision arising from such application, the Court has to consider even prima facie case as to whether the plaintiffs are likely to succeed or likely to fail in the suit.

... ..."

Mr.Vakil has also relied upon the decision of the Apex Court in Gagandeep Pratishthan Pvt. Ltd. v. Mechano and another, (2002) 1 SCC 475, which is concerned with prima facie case and comparative strength. In (2002) 1 SCC 475 (supra), the Apex Court held as under :

" ... ...
The High Court had decided to dispose of the appeal finally which it could not do because of the impending vacation of the Court at that time. Hence, it thought it fit to make the impugned interim order without considering the objections as to the maintainability of the appeal. The High Court erred in passing such orders in proceedings where the maintainability itself was being seriously questioned. However, in view of the peculiar facts of the case, it would not be proper at this point of time to interfere with the impugned order. But, the High Court is hereby directed to consider the question of condonation of delay and the objection of the appellants herein in regard to maintainability of the appeal first, before proceeding with the appeal any further.

... ..."

Mr.Vakil also relied on the decision of the Supreme Court in S.M. Dyecham Ltd. v. Cadbury (India) Ltd., (2000) 5 SCC 573. The Apex Court has observed as under in paragraphs 19, 20 and 21 :-

> " ... ...
>
> 19. This point deals with the principles applicable for grant of temporary injunction in trademark cases. Before American Cyanamid Co. v. Ethicon Ltd. it was customary for the courts to go into prima facie case in trademark cases for grant or refusal of temporary injunction. But in American Cyanamid it was observed that it was sufficient if a "triable issue" was presented by the plaintiff and the merits need not be gone into. The said judgment was referred to by this Court in Wander Ltd. v. Antox India (P) Ltd. The judgment in Wander Ltd. was followed in Power Control Appliances v. Sumeet Machines (P) Ltd. But in Gujarat Bottling Co. Ltd. v. Coca Cola Co. this Court again adverted to the prima facie case principle while grating temporary injunction.
>
> 20. All these rulings have been reviewed recently in Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd. It was pointed to this Court that here was considerable criticism of the principles laid down in American Cyanamid.
>
> xxx xxx xxx
>
> 21. In U.K., Laddle, J. reconsidered the principle recently and explained American Cyanamid in his judgment in Series 5 Software Ltd. v. Clarke. The learned Judge observed that in American Cyanamid, Lord Diplok did not lay down that the relative strength of the case of each party need not be gone into. Thereafter, this Court in Palmolive case has referred to Laddle, J.'s view and said that the view of Laddle, J., is correct and that American Cyanamid cannot be understood as having laid down anything inconsistent with the "old practice'. We may also add that now

the courts in England go into the question whether the plaintiff is likely or unlikely to win in the suit i.e. into the comparative strength of the case of the rival parties apart from the question of balance of convenience. (See again Laddle, J. in Barclays' Inc. v. R.B.S. Advanta where such a question is posed and where Series 5 Software was followed.) Therefore, in trademark matters, it is now necessary to go into the question of "comparable strength" of the case of either party, part from balance of convenience. Point 4 is decided accordingly.

... ..."

Mr.Vakil has also further argued that in view of the delay in applying, no interim relief can be granted. In support of the above proposition, Mr.Vakil has relied on the decisions in Veetrag Holding Co. Ld. v. G.S.T.C. Ltd., 37-3 GLR 536 and State of Maharashtra v. Digambar, (1995) 4 SCC 683. In 37-3 GLR 536 (supra), it has been held as under :-

" ... ...

Inasmuch as this contract was terminated on 6th December 1993, it was expected of the appellant to move for specific performance at the earliest, if they were serious about the same. The appellants certainly cannot be non-suited on the ground of limitation inasmuch as their suit is within time. However, when it comes to grant of equitable relief when the suit is filed after such a lapse of time, it cannot be said that the remedy of interim injunction was the necessary remedy and there was no other remedy available to the party concerned on this behalf.

... ..."

Mr.Vakil has also relied upon the decision in Daman Singh and others v. State of Punjab and others, AIR 1985 SC 973 to substantiate the contention as regards recording of arguments by the court. In paragraph 13 of the said decision, the Apex Court held as under :-

" ... ...

> 13. The final submission of Shri Ramamurthi was that several other questions were raised in the writ petition before the High Curt but they were not considered. We attach no significance to this submission. It is not unusual for parties and counsel to raise innumerable grounds in the petitioners and memoranda of appeal etc., but, later, confine themselves in the course of argument to a few only of those grounds, obviously because the rest of the grounds are considered even by them to be untenable. No party or counsel is thereafter entitled to make a grievance that the grounds not argued were not considered. If indeed any ground which was argued was not considered it should be open to the party aggrieved to draw the attention of the court making the order to it by filing a proper application for review or clarification. The time of the superior courts is not to be wasted in enquiring into the question whether a certain ground to which no reference is found in the judgment of the subordinate court was argued before that court or not?
>
> ... ..."

By relying upon the same, it is submitted by Mr.Vakil that whatever the trial court has observed in the order, should be taken as the arguments advanced before it and not beyond that.

Regarding breach of injunction is concerned, it is submitted by Mr.Vakil that since the injunction order was initially limited and since it was not extended, there is no question of committing any contempt. In this behalf, Mr.Vakil has relied upon the decision of the Apex Court in S. Rathinasabapathy and others v. K.S. Palaniappa Kandar and others, (1996) 7 SCC 205 and Murray & Co. v. Ashok KR. Newatia and another, (2000) 2 CC 367. In (1996) 7 SCC 205 (supra), the Apex Court held as under :-

> " ... ...
>
> 3. With respect to the High Court, we find it difficult to comprehend how the blame could be laid at the doors of the

appellants. There is no doubt that the appertain of the injunction was limited to three weeks. It si nobody's case that it was extended thereafter. The appellants showed respect to the order of the Court by stopping the construction as son as the injunction was received. After the expiry of three weeks when they did not receive ana order continuing the injunction, they proceeded with the construction. As such, it is difficult to understand how it can be said that the appellants had shown disrespect to the order passed by the Court. On the contrary, they showed respect by not proceeding with the construction as soon as the injunction was received and they continued with the construction only after its period expired. Therefore, the High Court was wrong in stating that the appellants committed gross violation of the spirit and intention of the order "as if it had been effective only for a period of three weeks from the date of pronouncement of the order". There is no question of the order being in existence after the expiry of three weeks. The expression "as if" used in the abstracted part of the order is totally unwarranted because indisputably, it was effective only for a period of three weeks. There was, therefore, absolutely no violation of the Court's order. We, therefore, fail to understand how the appellants can be hauled up for contempt under Section 12 of the Contempt of Courts Act. We are clearly of the opinion that there was no disrespect intended or shown and there was no contempt whatsoever. The impugned order of the High Court cannot, therefore, be allowed to stand.

... ..."

Regarding appointment of Court Commissioner, Mr.Vakil has relied upon the decision in Puttappa v. Ramappa, AIR 1996 Karnataka 257, wherein the Karnataka High Court held as under :-

" ... ...

In a suit for injunction the question as to

who is in possession of the property, is a matter to be decided by the Court on the basis of the evidence, either oral or documentary, to be adduced by the parties. That function cannot be delegated to a Commissioner who cannot find out as to who is in possession of the property. A Commissioner will not be in a position to determine the question as to who is in possession of the property when there is dispute between the parties regarding the same. Thus, a Commissioner cannot be appointed to find out as to who is in possession of the property and under O.26, R.9, C.P.C., a Commissioner can only be appointed to make local investigation to investigate the facts or other materials which are found in the property and to make a report in regard to that matter to the Court.

... ..."

Mr.Vakil has also cited the decision of the Apex Court in Messrs. Importers & M. Ltd. v. Pheroze Framroze, AIR 1953 SC 73, wherein the Apex Court held as under in paragraph 3 :-

" ... ...

(3) The respondents (the plaintiffs) do not contend that the appellant (the second defendant) is a 'tenant" as defined in section 5 (11) of the Act. The appellant, on the other hand, does not and, indeed, cannot deny that, as between the plaintiffs and the first defendant, the suit is one between a landlord and a tenant and as such the Small Causes Court is, under section 28 of the Act, the only Court competent to entertain the suit. Section 28 confers jurisdiction on the Court of Small Causes not only to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of the premises but also "to deal with any claim or question arising out of this Act or any of its provisions. There is no reason to hold that' "any claim or question" must necessarily be one

between the landlord and the tenant. In any case, once there is a suit between a landlord and a tenant relating to the recovery of rent or possession of the premises the Small Causes Court acquires the jurisdiction not only to entertain that suit but also "to deal with any claim or question arising out of the Act or any of its provisions" which may properly be raised in such a suit. The plaintiffs in this suit claimed that the purported subletting by the first defendant to the second defendant was unlawful both because it was a breach of the terms of the tenancy and also because as the statutory tenant after the determination of the contractual tenancy the first defendant was not entitled to create a sub-tenancy and they questioned the validity of the second defendant's claim to any protection under the Act. The claim or question as to the respective rights of the plaintiffs and the second defendant thus raised in the plaint certainly arises out of the Act and the language of section 28 appears to be wide enough to cover the same. Apart from that section, under the ordinary law a decree for possession passed against a tenant in a suit for ejectment is binding on a person claiming title under or through that tenant and is executable against such person whether or not he was or was not a party to the suit. The non-joinder of such a person does not render the decree any the less binding on him. It is in this sense, therefore, that he is not a necessary party to an ejectment suit against the tenant. It is, however, recognised that such a person is, nevertheless, a proper party to the suit in order that the question whether the lease has been properly determined and the landlord plaintiff is entitled to recover possession of the premises may be decided in his presence so that he may have the opportunity to see that there is no collusion between the landlord and the tenant under or through whom he claims and to seek protection under the Act, if he is entitled to' any. Such a person may be joined as a party to the suit from the beginning of the suit or at any later stage

> of the suit if the Court thinks fit to do so. The joinder of such a proper party cannot alter the character of the suit and does not make the suit any the less a suit between the landlord and the tenant or take it out of section 28 of the Act. To hold otherwise will be to encourage multiplicity of suits which will result in no end of inconvenience and confusion. In our view the decision and the reasoning of Chagla C.J. are substantially correct and this appeal must fail. We, therefore, dismiss the appeal with costs.
>
> ... ..."

24. At this stage, it is required to be noted that so far as A.O. Nos. 112 to 117 of 2002 are concerned, this Court (Coram : A.M. Kapadia, J.), at the time of admitting the appeals and at the time of deciding interim applications, on 11.3.2002, gave the following direction in paragraph 21 as under :-

> " ... ...
>
> 21. For the foregoing reasons, all these applications succeed in part and accordingly, they are partly allowed. Order passed below Exhs.51, 55 and 58 is stayed till decision of these appeals whereas order passed below applications Ex.5 is confirmed till decision of these appeals. It is also made clear that so far as construction put up by the defendants today onwards they shall not claim any equity in the event if they lose in the suits and accordingly, it is ordered that the defendants are permitted to complete remaining construction without claiming equity, however, they are restrained from transferring or alienating any portion of the suit property by way of sale, lease, gift or mortgage.
>
> ... ..."

By virtue of the said order, the defendants of both the three suits are restrained from transferring or alienating the portion of the suit property. However, the defendants are permitted to carry on remaining construction and the said order is still in force and

about a period of more than one year has passed thereafter. As stated above, all the aforesaid eight suits are in connection with the dispute about immovable property and the main question which requires consideration is whether the plaintiffs have executed the power-of-attorneys, after purchasing the property, and whether they are aware about the subsequent transactions.

As stated above, in three suits, injunction which was granted is modified by this Court (Coram : A.M. Kapadia, J). However, that modified order is still in existence as on today. Originally, most of the suits are filed in 1997 and they are re-numbered, after they are converted from Regular Civil Suits to Special Civil Suits. It is required to be noted that all the suits are at large before the trial court and evidence is yet to be recorded in each of the aforesaid suits. Mr.Vakil has, however, submitted that, at this stage, in view of the decision of the Supreme Court in Colgate Palmolive (India) Ltd. v. Hindustan Lever Limited, (1999) 7 SCC 1, comparative strength is required to be seen at the time of deciding the rights of the parties at the interlocutory stage. In (1999) 7 SCC 1 (supra), the Honourable Apex Court held as under :-

> " ... ...
>
> The object of interlocutory injunction is to protect the plaintiff against the injury by reason of violation of his right and relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before the uncertainty could be resolved. Generally, the interlocutory remedy by way of a grant of an order of injunction is intended to preserve and maintain in status quo the rights of the parties and to protect the plaintiff, being the initiator, of the action against incursion of his rights and for which there is no appropriate compensation being quantified in terms of damages. The basic principle of the grant of an order of injunction is to assess the right and need of the plaintiff as against that of the defendant and it is a duty incumbent on to the law courts to determine as to where the balance lies. Another redeeming feature in the matter of grant of interlocutory injunction is that in the

> event of a grant of injunction in regard to a party defendant where the latter's enterprise has commenced, and in that event the consideration may be somewhat different from that where the defendant is yet to commence its enterprise.
>
> ... ..."

It is, no doubt, true that the alleged sale deed in favour of defendants 1 to 4 was executed considerable time back. There is also some force in the argument of Mr.Vakil that it is not possible to believe that, all throughout, the plaintiffs were ignorant about the alleged sale deed in favour of the defendants. However, in my view, considering the chequered history of this litigation and especially when the suits are still at large before the trial court, any wider observation at this stage on the merits of the case may affect the rights of the parties in the trial itself. Under these circumstances and considering the nature of the litigation, in my view, a just balance is required to be struck till the pending suits are disposed of by the trial court.

It is required to be noted that so far as appeal under Order 43 of the Code of Civil Procedure is concerned, it is against a discretionary order of the trial court. In Wander Ltd. and another v. Antox India P. Ltd., 1990 (Supp) SCC 727, considering the scope of Order 43, the Apex court has observed as under :-

> " ... ...
>
> The appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below solely on the ground that if it has considered the matter at the trial stage it would have come to a contrary conclusion.

> If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.
>
> ... ..."

However, in the instant case, the learned Civil Judges have passed different orders. In one set of matters, one learned Civil Judge has granted injunction and in the other set of matters, the other learned Civil Judge has not granted injunction. In that view of the matter, keeping in mind the aforesaid ratio of the Apex Court decision referred to above, and considering the fact that both the Courts have passed contradictory orders, now, a balance is required to be struck at this interlocutory stage so that, since the dispute is going to be adjudicated by the trial Court after considering the evidence on record, neither side be put to a disadvantageous position. It is required to be noted that whatever material produced by the parties at the interim stage is only in connection with deciding the rights of the parties at an interim injunction application stage at Exhibit 5. The trial of the suits is yet to begin and the controversy in detail can be examined only if full-fledged evidence is available before the trial Court. It is, no doubt, true that, in the instant case, the plaintiffs are asserting their rights to the effect that, after purchasing the property, they have not tried to do anything by transferring the same or executing any document worth the name.

25. As against that, the other side has produced voluminous evidence to show that the plaintiffs have executed such power-of-attorneys and the sale deed in favour of defendant No.1 is a valid document of sale and for that purpose, they have also relied upon the affidavits filed by various persons, who have narrated the facts as to how these documents, viz., power-of-attorneys, etc., are prepared. Both the sides have produced voluminous documentary evidence, but, at this stage, it would not be proper to give any positive finding in this connection when parties have yet to adduce evidence and such evidence is required to be subjected to cross-examination also. Under the circumstances, in my view, a just balance is required to be struck. It is, no doubt, true that some of the issues in the suits are such which require full-fledged trial,

but it is required to be noted that the subsequent purchaser has purchased the property during the pendency of the suit and ad interim order was granted by the trial court in three suits at the time of issuance of notice, and as Mr.Vakil has submitted, even the purchaser is bound by the ultimate decree to be passed by the trial court. In my view, whether the power-of-attorneys executed are genuine or not, whether the defendants have got valid title or not or whether the plaintiffs have filed the suits with an ulterior motive or not, are all questions which are required to be adjudicated after full-fledged trial of the suits. This Court, while deciding appeals against the interlocutory discretionary order, is not deciding the whole suits and all these questions are required to be tried at the trial.

However, considering the fact that the defendants have already been permitted by this Court, while admitting the appeals, to carry on with the construction and since the said order is still in force, it would be just and proper to allow the defendants to carry on and complete the said construction. During the pendency of the suits, if the property is transferred, naturally, such transfer is subject to the result of the litigation, as, the suits are already pending before the Court. However, considering the fact that in five suits, there was no injunction and in three suits, the trial court has granted injunction, and during the pendency of the suit, the purchaser has purchased the property and considering the fact that, now, as observed by the learned single Judge (Coram : A.M. Kapadia, J.), construction has come up to a great extent, ultimately, even if the plaintiffs succeed, they can claim compensation in terms of money or monetary relief, in the suits.

During the course of the arguments, Mr.Thakkar submitted that, since the construction is going on, the defendants may be directed to give security so that ultimately if the plaintiffs succeed, they will be able to recover monetary value as regards their respective shares in the property. Mr.Vakil, on the other hand, has submitted that out of 22 purchasers, only 8 purchasers have filed suits and the rest have not made any grievance about the transaction in question. However, considering the material, at this interlocutory stage, it cannot be said that the plaintiffs have no case worth the name and it cannot be said that there is no triable issue involved in the suits, because, the question of limitation as well as genuineness of the documents, etc., are yet to be decided after the parties adduce evidence before the trial court. On the other hand, when the defendants are

permitted to make construction by the interim order of this Court, so far as the question of balance of convenience is concerned, in my view, the interim order passed by the learned single Judge is required to be continued till the suits are finally decided and considering the totality of the facts and circumstances of the case, in my view, the defendants should be permitted to complete the construction, which, in fact, they were permitted to carry on at the time when these appeals were admitted one year back. In the facts and circumstances of the cases, it would be just and proper to continue the interim direction given by the learned single Judge (Coram : A.M. Kapadia, J.) at the time of admitting the appeals.

However, over and above the same, if the defendants want to transfer or alienate the suit property during the pendency of the suits, before transferring or alienating the suit property, the defendants are directed to disclose the names of the purchasers before the trial court and it will be open for the plaintiffs to join such purchasers in the pending suits and such purchasers also will be bound by the ultimate decision of the trial court in the suits one way or the other.

Mr.Vakil, however, submitted that even if they are not parties, they are bound by such decree. However, in my view, since the matter is at large before the trial court, it would be just and proper if their names are disclosed before the trial court and if they are accordingly joined in the suits, ultimately, the trial court can pass an effective order in case the suits of the plaintiffs succeed. Accordingly, in my view, the balance of convenience is required to be maintained by giving the aforesaid directions in the matters.

Over and above these suits, A.O. No.77 of 2001 is disposed of by this Court on 26th March, 2003 by way of a consent order. In that order, this Court has already observed that Special Civil Suit No.564 of 2000, from which the aforesaid A.O. No.77 of 2001 arose, is required to be heard along with the present suits. Accordingly, all these suits, as well as Special Civil Suit No.564 of 2000 are to be heard together, so that there may not be any contradictory findings, as has happened at the time of deciding Exhibit 5 and considering the fact that large immovable property is involved and considering the fact that, initially, most of the suits were filed in the year 1997 and a period of more than six years has passed, the trial court is directed to dispose of the aforesaid suits along with

Special Civil Suit No.564 of 2000, as expeditiously as possible and preferably by 31st August, 2003. It is clarified that the observations of this Court in the present order or observations of the trial courts made at the time of deciding Exhibit 5 and other applications may not be taken into consideration at the time of deciding the suits and the observations are only tentative in nature and the suits are to be disposed of on their own merits and as per the evidence which might be led by the parties at the time of the trial of the suits.

26. Civil Application Nos. 6193, 7117 and 7118 of 2002, which are filed for additional evidence, are not required to be examined at this stage. If the plaintiffs so desire, they can submit their evidence before the trial court as the suits are still at large and the plaintiffs can produce whatever evidence is required to be produced before the trial court in the pending suits. It is, therefore, not necessary to consider the said applications for additional evidence in the present appeals and they are accordingly disposed of.

27. It is further clarified that this Court has not decided whether the defendants have purchased the property in breach of the injunction. It is for the trial court to take this point into consideration and decide the same whether the injunction order of the Court is breached by any one of the defendants. Question about genuineness of the documents or otherwise is also required to be decided after full-fledged evidence is adduced by the parties in the pending suits. Therefore, all these points are required to be kept open as such points are required to be decided after the parties adduce evidence. Even otherwise, when the purchasers have purchased the property during the pendency of the suits, naturally, they have taken the property with full knowledge and risk that a litigation is pending in respect of the said property.

28. In view of what is stated above, the Appeals are accordingly partly allowed, by continuing the interim order passed by the learned single Judge (Coram : A.M. Kapadia, J.) during the pendency of the aforesaid civil suits, with a direction that if the defendants want to sell or transfer any portion of the suit property, the names of such purchasers should be disclosed to the trial court and the plaintiffs will be at liberty to join them in the suits so that, ultimately, such purchasers will be bound by the decree to be passed by the trial court.

R & P to be sent back to the trial court

forthwith.

10th April, 2003 (P.B. Majmudar, J.)

****

(apj)

After the order is pronounced, Mr.Solanki requested that the order may be stayed for some time as the concerned appellants want to carry this matter further. However, in view of the directions given in the order to the effect that even if the property in question is transferred or alienated, such transfer or alienation will be subject to the result of the suits, this order is not required to be stayed any further.

10th April, 2003 (P.B. Majmudar, J.)

****

(apj)